STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:	)	Docket No. 02-AFC-4
	)	
Application for Certification of the Walnut Energy Center (Turlock Irrigation District)	)	**Staff's Opening Brief**
	)	October 31, 2003
	)	

INTRODUCTION

On October 9, 2003, the Committee assigned to review Turlock Irrigation District's (TID's) Application for Certification (AFC) for the Walnut Energy Center closed the evidentiary record for the proceeding and directed parties to file Opening and Reply Briefs, on October 31 and November 14, respectively. There were no active interveners in the proceeding and contested topics were limited to two issues in Air Quality, and one issue each in Compliance and Land Use. This is staff's Opening Brief on those topics.

The proceeding was initiated on November 19, 2003, when TID filed an AFC for a proposed 250-megawatt (MW) natural gas-fired, combined-cycle electric generating facility. The application was deemed complete on December 18, 2002. The project site is located in an industrially-zone area, currently used for agriculture, about four miles west of downtown Turlock. TID is proposing to build the project over a two-year period, beginning in 2004.

Upon completion of the discovery phase of the AFC process, staff prepared Part 1 of the Final Staff Assessment (FSA Part 1), which contains its final analysis of all technical areas except hazardous materials management. It was published on August 8, 2003. On August 29, 2003, staff published Part 2 of the FSA (FSA Part 2), which contained staff's assessment of hazardous materials management. Staff filed an Addendum to the FSA of September 22, 2003, to

provide additional information requested by the Committee, and to provide an update of staff's position on issues that were the subject of continuing discussion between staff and TID. Staff also filed Supplemental Testimony on October 8, 2003, to memorialize an agreement between staff and TID on two soils and water resources Conditions of Certification. On September 29 and October 9, 2003, the Committee conducted hearings at which the FSA Parts 1 and 2, staff's addendum and supplemental testimony, the AFC and its supplements, data responses provided by TID, and additional testimony of TID were entered into evidence.

Areas that were uncontested include: biological resources, cultural resources, hazardous materials management, noise and vibration, public health, socioeconomics, soil and water resources, traffic and transportation, transmission line safety and nuisance, visual resources, waste management, worker safety, facility design, geology and paleontology, power plant efficiency; power plant reliability, transmission system engineering, and alternatives. With respect to these topics, staff respectfully recommends that the Committee adopt the Conditions of Certification identified in the FSA and modified through any testimony offered at the hearings.

ARGUMENT

As noted above, the only contested topics in this case were two issues associated with Air Quality, and one issue each in Compliance and Land Use. The Air Quality topics concern two conditions of certification (**AQ-C6**, **AQ-C8**) recommended by staff. The first one addresses the appropriate ammonia slip level for the facility. The second condition places limits on the use of offsets about which EPA has expressed reservations. In the area of compliance, TID opposes staff's proposed **COM-8**, which establishes the parameters and the review process for the applicant's security plan, and proposed an alternative version of **COM-8**. Finally, in the area of Land Use, TID opposes **LAND-6**, which

requires TID to provide compensation for the conversion of 18 acres of prime farmland at the project site.

I. THE EVIDENCE IS UNCONTROVERTED THAT AN AMMONIA SLIP LEVEL OF 5 PPM IS FEASIBLE AND WILL REDUCE SECONDARY PARTICULATE FORMATION, AND THEREFORE SHOULD BE REQUIRED.

In the area of air quality, one of the disagreements between staff and TID concerns the level of "ammonia slip" that should be permitted. Ammonia slip refers to the release into the atmosphere of unreacted ammonia as a result of the selective catalytic reduction (SCR) process used to control NO_x emissions from the project. (Exh. 11, p. 4.1-40) The Final Determination of Compliance (FDOC), prepared by the San Joaquin Valley Air Pollution Control District (SJVAPCD), identifies an ammonia slip level for the project of 10 ppm. (Exh. 41, p. 3) Staff recommends that ammonia slip be limited to 5 ppm, because ammonia slip has the potential to contribute to secondary particulate formation.

Ordinarily, staff will defer to the local air district to determine the appropriate amount of mitigation for criteria pollutant emissions. However, the SJVAPCD does not take into account the impact of ammonia slip on secondary particulate formation. (10/29/03 RT, p. 41:17–20) Therefore, the SJVAPCD's recommendations for addressing the project's particulate emissions ignore the contribution from ammonia slip. The only testimony offered by the SJVAPCD on this issue was a statement that it believes that controlling NO_x is "more important" than the secondary particulate that may be formed from ammonia slip, implying that the SJVAPCD and the Commission must pick between controlling NO_x and controlling ammonia slip. However, on cross-examination, the SJVAPCD witness conceded that the Commission need not choose between controlling NO_x and ammonia because NO_x emissions can be kept at 2 ppm regardless of whether ammonia slip is 5 ppm or 10 ppm.[1] (*Id*. at p. 42:3–11)

[1] TID made a similar argument (*See* Exh. 45, p. 7). However, as with SJVAPCD, the TID witness agreed that it is feasible to have both a NO_x limit of 2 ppm and an ammonia slip level of 5 ppm. Therefore,

Interestingly, the SJVAPCD has never performed a cost effectiveness analysis comparing 5 ppm ammonia slip with 10 ppm ammonia slip, nor has it generically considered the secondary effects of ammonia slip in establishing the Best Available Control Technology (BACT) limits for NO_x. (10/29/03 RT, p. 43:21–25 - 44:1-2) In short, the SJVAPCD ignores the contribution of ammonia slip to particulate formation altogether. Given the severity of the particulate problem in the San Joaquin Valley, staff finds this decision questionable at best and believes that under CEQA, the Commission would be ill-advised to similarly ignore this potentially significant contribution to a serious existing environmental problem. Adopting the staff recommendation for an ammonia slip level of 5 ppm will address this issue by minimizing the project's contribution to particulate pollution in an effective and reasonable manner.[2]

TID opposes staff's recommendations for a 5 ppm ammonia slip limit for several reasons. First, TID cites the fact that the amount of secondary particulate created by ammonia slip is reduced in areas where the ambient air is ammonia rich. (Exh. 45, p. 7) Staff agrees that higher ambient ammonia levels do *reduce* the potential for secondary particulate formation, but does not believe that there will be *no* contribution to secondary particulates from ammonia slip. As staff testified, research indicates that in an ammonia-rich area, a 50 percent reduction in the amount of ammonia will reduce fine particulate matter formation by 15 percent, which correlates with a conversion rate of 30 percent. (Exh, 11, p. 41-40) Thus, even in an ammonia rich environment, an ammonia slip level of 10 ppm translates into 675 – 1,600 pounds of additional particulate attributable to

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referring to "more effective" control of secondary particulates through a higher ammonia slip level is disingenuous at best.

[2] It is important to note that there is no dispute that a 5 ppm ammonia slip level is feasible. The Energy Commission has licensed several projects with a 5 ppm ammonia slip level. The South Coast Air Quality Management District has determined that Best Available Control Technology (BACT) for ammonia is 5 ppm, and has included that limit (along with a NO_x BACT level of 2 ppm) in FDOCs for two other projects currently before the Energy Commission. (01-AFC-25; 01-AFC-6) In addition, the California Air Resources Board explicitly recommends that districts consider a 5 ppm level in licensing power plants. (Guidance for Power Plant Siting and Best Available Control Technology, 1999, p. 12) Furthermore, the Midway-Sunset project, which is located within the same air district, recently agreed to an ammonia slip level of 5 ppm as part of its request to amend its Commission license to add SCR.

this project *per day*. (*Ibid*.) This is *two to four times* the project's directly-emitted particulate emissions (*ibid*.), which are fully offset. Surely if offsets are appropriate for the directly-emitted particulates, feasible reductions in the amount of secondary particulates achieved by a lower ammonia slip level are appropriate.

In addition, TID cites the recently adopted PM_{10} attainment plan as support for its position. (Exh. 45, p. 7) As a preliminary matter, we note that this plan has not yet been approved by the United States Environmental Protection Agency. (In fact, the SJVAPCD does not currently have an approved PM_{10} attainment plan.) TID, however, bases its conclusions about the appropriateness of a higher ammonia slip level on this plan. TID specifically references a sensitivity analysis performed as part of the process to develop the PM_{10} attainment plan, which it claims supports a conclusion that basin-wide reductions in ammonia may provide only limited (and unspecified) benefits. (Exh. 45, p. 8)

In the first place, staff disagrees that "limited" benefits are not necessarily worth pursuing, given the severity of the particulate problem in the San Joaquin Valley. More importantly, TID referenced *no* empirical data to support its conclusion that ammonia reductions would have limited benefits. (9/29/03 RT, p. 94:1–8) TID quotes a statement from the sensitivity analysis summary that it is "unclear whether an expeditious attainment strategy requires ammonia reductions." (Exh. 45, p. 7) However, the quotation is out of context. When the sentence is read in conjunction with the preceding two sentences, it is clear that the sensitivity analysis in fact *supports* the staff position. (These statements explain (1) that the ambient data indicate that nitrate formation was not limited by the availability of ammonia, and (2) that the ambient data is inconsistent with the modeling results.) Thus, the modeling exercise relied upon by TID to support its claims that ammonia limits will not provide benefits itself produced counter-intuitive results and could not be supported by the ambient data. This modeling should not be

used as a justification for disregarding the impacts associated with a higher ammonia slip level of 10 ppm.[3]

TID also argues that the emissions inventory for ammonia in the San Joaquin basin is dominated by agricultural sources. (Exh. 45, p. 8) This is completely irrelevant. Not only do chemical reactions occur in the same way regardless of the origin of the reactants, but the same argument could be made for *every single* criteria pollutant emitted by the power plant. Even the applicant's witness agreed with these facts. (9/29/03 RT, p. 87:24– 4 – 88:1–10)

Finally, TID argues that staff's position in this case is inconsistent with staff's position in other cases. (Exh. 45, p. 8) However, as staff's witness clearly demonstrated, that statement is patently false. The recommendation for a NOx emission limit of 2 pmm and an ammonia slip level of 5 ppm has been made in 11 of the past 12 proceedings, with the one exception representing a staff attempt at a compromise. (9/29/03, p. 95:18-25) Moreover, as control technologies advance, emission limits do become lower. Staff sees no reason to recommend outdated emission limits when lower emission limits are feasible and provide air quality benefits merely to ensure "consistency" with one of twelve cases.

In sum, the question here is not whether TID should be required to limit ammonia slip to 5 ppm simply because such reductions are feasible. Instead, the question is, in light of the fact that the SJVAPCD does not consider the contribution of ammonia slip to secondary particulate concentrations, should the Commission use deference to the Determination of Compliance as a justification for ignoring the impact in its decision? Staff believes the answer is no. Under its responsibilities pursuant to the California Environmental Quality Act (Pub. Resources Codes, § 21000 et seq.), the Energy Commission must determine

[3] Staff notes that the Plan also states that, "the District is committed to pursuing an expeditious ammonia control strategy. . . [and] commits to adopting ammonia control measures that have been demonstrated as technologically and economically feasible and necessary for the San Joaquin Valley." (2003 PM10 Plan, ES-16) As noted above, there is no dispute that a 5 ppm ammonia slip level is feasible.

whether the potential for ammonia slip to contribute to secondary particulate formation constitutes a significant adverse impact. The evidence in this case indicates that ammonia slip may contribute to a substantial amount of secondary particulate formation. Because area residents are already exposed to unhealthy levels of particulates, and because the SJVAPCD has not addressed the contribution of the project to particulate levels from ammonia slip level identified in the FDOC, the Committee should do so and should require mitigation. Staff urges the Committee to adopt a 5 ppm ammonia slip limit.

II. THE COMMISSION SHOULD REQUIRE RESOLUTION OF EPA CONCERNS THAT THE ERCS ARE NOT SURPLUS.

TID also opposes a staff-proposed Condition of Certification that would allow TID to use two Emission Reduction Credit (ERC) certifications (S-1834-2 and C-492-4) only if the United States Environmental Protection Agency (U.S. EPA) provides final approval of either a pending SJVAPCD Rule (Rule 2201) or the pending SJVAPCD ozone attainment plan. (Exh. 11, p. 4.1-63) If such approval is not provided, alternative ERCs must be provided and approved by the SJVAPCD. According to TID, there is no evidence in the record that disputes the acceptability of the credits. (Exh. 45, p. 10) However, this testimony ignores the letter provided to the SJVAPCD by U.S. EPA, stating, ". . . pre-baseline ERCs are not surplus if they are not correctly included in all of the relevant attainment plans." (Exh. 36) The letter clearly indicates that the U.S. EPA, which is responsible for implementing the federal Clean Air Act, believes that the ERCs may not meet the Clean Air Act requirement that such ERCs be surplus. (42 U.S.C.A § 7503(a)(1)(A))

Interestingly, TID recognizes that EPA has the final word on the acceptability of those offsets. TID's own witness even testified that if there is no U.S. EPA approval in the future, it would halt construction of the facility. (9/29/03 RT, p. 76:12-24) Although staff's proposed condition requires surrender of valid ERCs prior to first turbine firing, which presumably would be after construction is completed, staff nonetheless believes it is appropriate for the Commission to

include a specific requirement that the issue be fully resolved by U.S. EPA. Without such a requirement, in light of U.S. EPA's publicly-expressed concerns about the offsets, the Commission cannot find that the project will be in compliance with all applicable laws ordinances regulations, and standards. (Pub. Resources Code § 25525) Staff's proposed **AQ-C8** accomplishes that objective and should be adopted.

III. STAFF'S COM-8 OFFERS A MORE EFFICIENT AND WORKABLE METHOD OF ENSURING THAT AN ADEQUATE SECURITY PLAN IS IMPLEMENTED THAN THE APPLICANT'S PROPOSAL.

Staff and TID have offered two different versions of **COM-8**, the condition that requires implementation of a security plan for the proposed facility. Although TID's version of **COM-8** differs in many regards from that proposed by staff, TID states that the crux of the disagreement about **COM-8** concerns the approval process. TID proposes that the Compliance Project Manager (CPM) provide review of and comment on the plan, but not approve the plan, as recommended by staff in its version of **COM-8**. TID proposes that any disputes between the staff and TID be resolved by the Commission's Siting Committee. (Exh. 45, p. 44, 46)

Although this portion of TID's proposal apparently acknowledges the Commission's jurisdiction over this issue, TID's testimony also states that the Commission does not have the legal authority to share TID's accountability to its ratepayers for plant security. In light of this ambiguity, staff believes it is important to explicitly address this issue. Public Resources Code section 25523(a) specifically requires the Commission to include in its decision, "specific provisions relating to the manner in which the proposed facility is to be designed, sited, and operated in order to. . . assure *public health and safety*." (emphasis added). TID's assertion during oral argument that the Warren-Alquist Act provides no authority to address security concerns (*See* 10/09/03 RT, p. 138:8-12) is erroneous. A failure of plant security could obviously have health consequences on the surrounding community, and it is the Commission's

responsibility to address this issue in the siting process. Moreover, the Commission's responsibility to address plant security is in addition to the Commission's responsibility to ensure compliance with LORS and to comply with CEQA.

TID also states that the Commission lacks the necessary expertise to review security plans, and that the staff's **COM-8** lacks safeguards necessary to ensure fair treatment, protection of confidential information, and avoidance of conflicts of interest. These broad-brushed allegations are difficult to comprehend. TID conceded that it had no idea how many security plans the Commission has reviewed, nor is it aware of the training and education of the staff assigned to review plant security matters. (10/09/03 RT, p. 44:11-21) TID doesn't know whether the Commission consults with other state and federal agencies responsible for security matters, (*id*. at 44:22-25 – 45:1-2), and isn't specifically aware of provisions governing conflicts of interest. (*Id.* at 52:5-9) It is clear that TID's concern is not based on any specific knowledge of the rules and regulations under which the Commission conducts its business.

In fact, Commission staff have reviewed a number of security plans and do receive training in security matters. (10/09/03 RT, p. 68:6-12; p. 76:16-24; p. 128:19-25 - 129:1-13) Moreover, the Commission is subject to rules and regulations governing protection of confidential information (*See* Govt. Code § 6250 et seq., Cal. Code Regs., Tit. 20 § 2501 et seq.) and conflict of interest (See Govt. Code § 87000 et seq, § 89501 et seq.)[4] TID's allegations are baseless and do not justify an entirely new compliance process for TID's security plan.

With respect to TID's claim that **COM-8** doesn't specify exact standards, staff pointed out that virtually all Commission conditions requiring plans identify performance standards rather than specific criteria. (Exh. 47, p. 13) We do this

[4] Unfortunately, the lack of specificity in TID's accusation makes it difficult to pinpoint exact statutory or regulatory provisions that address any specific concerns.

so that the plans can incorporate measures that are tailored to the project and the project site. It is difficult to imagine a specific standard that would be equally applicable to small and large projects, projects that use anhydrous ammonia and projects that do not, and projects that are located in rural environments and projects located in large urban areas. Finally, we note that TID indicated that "it would go a long way towards removing [the] problem" if Commission staff were available to work with TID in the development of the plan. (10/09/03 RT, p. 47:13-25) Staff has committed to doing so. (*Id*. at 72:6-9)

TID also claims that it is "nonsensical" to halt construction for lack of an approved operational security plan. (Exh. 45, p. 47) This is a mischaracterization of **COM-8**, which states that the operational security plan does not need to be developed until 60 days prior to the initial on-site receipt of hazardous materials. (Exh. 47, p. 13-14) Regardless of the status of construction activities, staff believes that there *must* be an approved security plan in place prior to the receipt of hazardous materials. To allow delivery of hazardous materials without an approved plan that is designed to minimize the risks associated with those materials would be an abrogation of the Commission's responsibility to ensure that public health and safety are protected during construction and operation of the power plant.

TID next argues that a rulemaking is a more appropriate proceeding for addressing security concerns. While staff agrees that the Commission could choose to initiate a rulemaking, doing so would not obviate the need to address security concerns in an individual siting case. The Walnut Energy Center would still need a security plan regardless of the initiation of such a proceeding. Therefore, staff does not think that TID's recommendation is germane to the question of the appropriate language for **COM-8**.[5] Moreover, staff does not recommend a rulemaking for addressing security concerns. We believe that the unique features of each project, and the evolving nature of security measures renders a rulemaking singularly inappropriate for such a purpose. We note that

[5] We acknowledge that if the Commission completes a rulemaking on security issues, the results of that rulemaking could be incorporated into this and other siting cases.

the Commission has for many years used a project-specific approach for the more than 20 plans required in other siting cases without difficulty. We see no reason to begin a lengthy regulatory process at this time to solve a problem that doesn't exist.

Finally, applicant claims that CPM approval of a security plan raises "due process" issues. TID does not identify the specific due process concerns but includes a rather general statement that an appeal process for such disputes over the conditions of CPM approval may not be adequate. At the hearing, TID elaborated that its concern centers on its belief that there is no quick appeal route for addressing confidential matters. (10/09/03 RT, p. 142:22-24) As staff pointed out at hearings, however, applicable law does allow the Commission to hear issues involving confidential data while still protecting that data. Government Code § 11425.20 states as follows:

> (a) A hearing shall be open to public observation. Nothing in this subdivision limits the authority of the presiding officer to order closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes:
> (1) To satisfy the United States Constitution, the California Constitution, federal or state statute, or other law, *including but not limited to laws protecting privileged, confidential, or other protected information.* (emphasis added)

Therefore, to the extent that disputes about the security plans submitted pursuant to **COM-8** cannot be resolved informally within the Commission, the formal dispute resolution process can accommodate the need to protect the confidentiality of security plans. And, while staff is uncertain why the same issue would not arise if the Siting Committee resolved the dispute, as proposed by TID, it is clearly unnecessary to create a new process solely to address confidentiality concerns. Staff therefore recommends that the Committee adopt staff's proposed **COM-8**.

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IV. CEQA CONTAINS NO PROHIBITIONS ON COMMISSION EXAMINATION OF IMPACTS ASSOCIATED WITH THE PROJECT'S CONVERSION OF PRIME AGRICULATURAL LAND.

TID has argued that the Commission is precluded from evaluating the issue of whether the conversion of prime farmland caused by the project is a significant impact or not, and from imposing feasible mitigation for any such impacts. (Exh. 45, p. 65) The sole basis of the applicant's argument is Section 15183 of Title 14 of the California Code of Regulations, one of the guidelines implementing the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.).[6] (*Ibid.*) This section states that when a subsequent development is consistent with a general plan for which an EIR was certified, CEQA limits further review to effects that are peculiar to the project at hand or to effects which new information shows will be more significant than identified in the previous environmental document.

In 1992, the City of Turlock prepared an EIR that identified the conversion of 4,700 acres of prime agricultural land, of which the project site is a part, as a significant adverse impact. The City of Turlock certified the EIR and adopted a resolution claiming that there was no feasible mitigation for the project and that the project benefits outweighed the impacts caused by the conversion. (Exh. 50) Therefore, according to TID, the Commission is precluded from evaluating whether or not the conversion of 18 acres of prime farmland is a significant effect.

However, TID's arguments ignore the fact that the courts have interpreted this very section and determined that its applicability is optional. In fact, a Lead Agency must both affirmatively elect to use this provision and provide notice of its intent to use this provision. As a result, the court in *Gentry v. City of Murietta* ((1995) 36 Cal.App.4th 1359, 43 Cal.Rptr.2d 170) held that because the Lead Agency had opted to process the project "from scratch", the City could *not* rely on a previous environmental document to limit its review of a later project,

[6] This guideline implements Public Resources Code section 21083.3.

notwithstanding the fact that all of the criteria in Section 21083.3 were assumed to be met. (*Id*. at 1406, 1407) The same is true here. The Commission has not chosen to curtail its assessment of this project based on the prior EIR, nor has it identified the prior EIR as a relevant document in any public notice or request for comments. As a result, not only is the Commission *not* precluded from examining the issue of agricultural land conversion, but it has an affirmative duty to do so.

Moreover, staff recommends against the Commission deciding at this point to rely on Section 21083.3 as a justification for omitting an evaluation of agricultural land conversion. There are three reasons for this. First, the analysis in the 1992 EIR of the impacts caused by agricultural land conversion is incomplete, due to the fact that it lacks a discussion of mitigation options, including those recommended by the Department of Conservation and the Department of Food and Agriculture. TID's assertions that the EIR includes an exhaustive review of agricultural land conversion are simply not supported by the record.[7] The discussion in the EIR consists of a less than one-page discussion of the amount of acreage that would be converted and a single conclusory statement that "the only measures available which would reduce impacts on agriculture to a level of insignificant would represent substantial changes to the proposed project." (Exh. 48, p. 33) Included in the Resolution adopting a statement of overriding considerations (Resolution No. 93-042) is an additional statement, "the City Council finds that the ability of the City to meet its fair share of the regional need for housing, to ensure that there is a balance of jobs and housing, and sufficient services for residence of community as growth occurs outweighs the environmental risk of farmland conversion within the Planning Area." (Exh. 50) There is no other discussion of this issue in any of the documents identified by staff and by the applicant in their respective testimony.

[7] TID's testimony refers to both a "detailed discussion of the impacts of conversion" (Exh. 45, p. 68), and "thorough environmental review". (*Id.* at 65)

In addition, the EIR fails to acknowledge the recommendations the City received from two state agencies -- the Department of Conservation and the Department of Food and Agriculture -- to evaluate the use of agricultural easements as potential mitigation measures. (Exh. 48, EIR Appendix A, Letter of Department of Conservation, Letter of Department of Food and Agriculture) This is the same mitigation that both staff and the Department of Conservation are recommending in this proceeding. In fact, the *only* method of avoidance discussed in the EIR is project alternatives – no mitigation is discussed at all. Staff is uncertain why the EIR omits any discussion of these mitigation options, but believes failure to consider that option is yet another reason not to rely on the previous EIR.

Finally, we note that the fact that mitigation may not have been feasible for the conversion of 4,700 acres doesn't mean that there isn't feasible mitigation available for the conversion of 18 acres of prime farmland. For example, easements for 4,700 acres might be prohibitively expensive. However, as the letter from the Department of Conservation indicates, Lead Agencies are increasingly accepting and requiring the use of easements for agricultural land conversion. There has been no evidence presented in this case that such an option is infeasible, and it should therefore be considered as a mitigation option for the impacts to prime agricultural land that this project will create.

Although staff believes that the case law is clear that reliance on Section 21083.3 would be inappropriate in this case, we recognize that the Commission may disagree and decide to rely on Section 21083.3. If that is the case, the Commission must then carefully consider the extent of review that is required under that section. It is important to note that the language of the statute does not address the question of whether a previous statement of overriding considerations can be used in conjunction with a later project. Although the CEQA process requires overrides in the event that a Lead Agency wishes to approve a project with unavoidable adverse impacts (Cal. Code Regs., tit. 14, § 15093), the override finding is made *after* review of the EIR. Yet Section 21083.3 specifically refers to a later Lead Agency using the EIR itself.

In light of this ambiguity, staff reviewed the Committee analyses and files prepared at the time the legislation was pending to better understand the legislative intent of the bill. The bill was proposed because a previous tiering or "piggybacking" provision of CEQA was, in the minds of the building industry, underutilized, thereby increasing CEQA compliance costs at the local level. Apparently local governments were reluctant to rely on those provisions for approval of housing developments (to which this language was originally limited) and were requiring duplicative analysis, at the cost of developers. This bill was designed to address that problem.

However, the discussions of the bill's effect that were prepared by various participants in the legislative process do not address the situation present in this case – where a previous EIR was adopted with a statement of overriding considerations. In fact, they only address situations in which mitigation measures, either those specifically adopted for the project, or by uniformly applied development policies, in fact mitigated the identified impacts. For example, the analysis of the Senate Committee on Local Government states that the bill "would omit from an EIR any coverage of adverse effects which would be mitigated. . ." (Senate Committee on Local Government staff analysis of AB 1185) Similarly, the Resources Agency stated that "if mitigation is not required for the [identified adverse] effect, then the effect would have to be analyzed in a later EIR." (Resources Agency Enrolled Bill Report for AB 1185) The Senate Republican Caucus stated that bill would apply to situations in which the "proposed project conforms to a community plan or zoning action for which an EIR was prepared and feasible mitigation measures have been taken." (Senate Republican Caucus Analysis of AB 1185)

Thus, it appears that it would be wrong to read into Section 21083.3 an abrogation of the Commission's responsibility to evaluate impacts identified in a previous EIR, but not mitigated. This conclusion is not only consistent with the legislative history of the bill, it is consistent with the general principles of CEQA which require it to be interpreted in such as manner as to provide the fullest

possible protection to the environment within the reasonable scope of the statutory language (*Friends of Mammoth v. Board Of Supervisors* (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761,768)

Moreover, it is also consistent with one of the more recent cases to address a Lead Agency's responsibility in situations in which another agency has identified unavoidable impacts. In *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 126 Cal.Rptr.2d 441), the court addressed the validity of regulations implementing one of the tiering provisions of CEQA. The court stated that when an agency wishes to rely on a previous EIR which identified significant unavoidable effects, the decisionmakers must go on the record and explain specifically why they are approving the latter project despite those significant unavoidable effects. (*Id.* at 125)

The court emphasized CEQA's role as a "public accountability statute," and said that in approving environmentally detrimental projects, decisionmakers must "justify their decisions based on counterbalancing social economic or other benefits and point to substantial evidence in support. . . Even though a prior EIR's *analysis* of environmental effects may be subject to being incorporated into a later EIR for a later more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable effect." (*Ibid*., emphasis in the original) That means that regardless of the previous override finding of the City, if the Commission wishes to rely on the 1992 EIR, it must evaluate whether feasible mitigation is available for the previously-identified significant impact, and if so, require its implementation as part of the Commission decision. (Pub. Resources Code, § 21081)

When that principle is applied to this case, it can be clearly seen that no such finding could be made. There is feasible mitigation available and it should be required. Both the staff and the Department of Conservation have identified that the conversion of 18 acres of prime agricultural land is a significant impact and

identified easements or trusts as a measure that can be effectively used to mitigate that impact. The applicant has not even addressed the effectiveness of these measures. Instead, it argues that the Commission should look the other way merely because a more-than-ten-year-old EIR contains a brief (and incomplete) discussion of this issue.[8] Such a position is inconsistent with CEQA and with the policies this agency has used to implement CEQA. In order to fully meet its responsibilities to protect the environment from the adverse impacts that will be caused by this project, the Commission should fully evaluate the impacts associated with the conversion of agricultural land and require the mitigation identified by staff in **LAND-6** in order to mitigate the impacts to an insignificant level.

V. THE CONVERSION OF 18 ACRES OF PRIME AGRICULTURAL LAND IS A SIGNIFICANT ADVERSE IMPACT AND THE COMMISSION SHOULD REQUIRE MITIGATION.

TID also implies that if the Commission does evaluate the effect of agricultural land conversion, that the small amount of acreage converted renders the effect insignificant. Specifically, TID's testimony argues that the conversion of 18 acres of prime farmland is not a significant impact and that no mitigation should be required. TID references the fact that 18 acres is less than .0064 percent of "important" farmland within the County. (Exh. 45, p. 70, 71)

Staff disagrees with TID's conclusion. As a matter of law, we note that a "ratio" theory of significance has been rejected by courts interpreting CEQA. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 270 Cal.Rptr. 650) As stated in a later case, "'the relevant question'. . . is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in light of the existing cumulative effect. . . In the end, the greater the existing

[8] Applicant points out that in its 2002 review of the General Plan, the City of Turlock certified that the 1992 EIR was still adequate. However, a review of the two mitigated negative declarations prepared as part of that process (Exhs. 53, 53), and the two resolutions adopted by the City as part of that process (Exhs 51, 52) clearly shows that there is no new discussion of this issue.

environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, 126 Cal.Rptr.2d 441)

Staff's position is supported by the Department of Conservation (Department), which has indicated that the relatively small size of the parcel converted does not render the conversion less than significant.[9] The Department conducted a review of the specific facts of this project and concluded that, "[u]nless the mitigation measures from the general plan or zoning projects reduce the agricultural conversion impacts to less than significant, the Division [of Land Resources Protection] recommends that the 18-acre conversion be identified as a significant impact. The conversion should also be identified as a contributing factor to the cumulative impact of agricultural land conversion in Stanislaus County." (Letter of Erik Vink , Assistant Director, Department of Conservation to Bob Eller, Commission staff, dated September 2, 2003) Therefore, it is clear that TID's argument that the small amount of land converted renders the impact insignificant is not consistent with the approach used by the Department.

Staff agrees with the Department's conclusions. We note that the Department's approach is consistent with the principles espoused in the CEQA cases cited above, as well as with general CEQA principles that allow the use of qualitative, site-specific evaluations of potentially significant impacts. Staff urges the Committee to find that the conversion of 18 acres of prime agricultural land by the project will contribute to a significant cumulative impact and require the mitigation identified in **LAND-6**.

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[9] At hearings, staff indicated that it believed the Department used a 10-acre threshold. However, this threshold is for farmland inventory and mapping purposes only, and is not a CEQA significance threshold. The mapping program is conducted by a different branch of the division than the branch responsible for evaluating the significance of farmland conversion. As the Department's letter indicates, in evaluating the significance of agricultural land conversion under CEQA, there is no minimum threshold.

CONCLUSION

Staff is pleased that this project has reached the final stages of the proceeding with so few issues unresolved. Nonetheless, the issues that remain are important and should be carefully considered by the Committee in drafting its decision. Staff believes that in all three areas – air quality, compliance and land use – the staff position best reflects the appropriate balance between deference to the other entities and agencies that have reviewed these issues and the Commission's responsibilities to ensure compliance with CEQA and protection of public health and safety. Staff therefore urges the Committee to adopt staff's position and require implementation of **AQ-C6**, **AQ-C8**, **COM-8**, and **LAND-6**.

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Respectfully submitted,

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